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Werner Feld

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## THE JUDGES OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

WERNER FELD†

### I.

#### INTRODUCTION

THE COURT OF JUSTICE of the European Communities, the common judicial organ of the European Coal and Steel Community (ECSC), the European Economic Community (EEC, better known as the Common Market), and the European Atomic Energy Community (Euratom), has in 1963 entered its second decade of operation. This Court, located in Luxembourg, began to function in 1953<sup>1</sup> as the Court of Justice of the European Coal and Steel Community. When in 1958 the Common Market and Euratom were established, it was transformed into the Court of the European Communities. The "new" Court took over from its predecessor, the majority of the judges, most of the other personnel, its physical plant, and its docket of nearly forty cases.<sup>2</sup>

The Court is composed of seven judges. While in principle the Court sits in plenary session, it is authorized to set up chambers composed of three to five judges. The Court, in fact, has made use of this authorization and has established two chambers of three judges each.<sup>3</sup>

The basic task of the Court is to ensure the observance of law in the interpretation and application of the Treaties underlying the three European Communities. In the discharge of this responsibility the Court is aided by two advocates-general whose functions are "to present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court of Justice with a view to assisting the latter in the performance of its duties. . . ."<sup>4</sup> The advocates-

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† LL.B., 1933, University of Berlin; Ph.D., 1962, Tulane University. Associate Professor of Political Science; Acting Chairman, Department of Political Science and Economics, Moorhead State College, Moorhead, Minnesota.

1. The first judges of the Court were appointed on December 2, 1952.

2. 1 *Amtsblatt der Europaischen Gemeinschaften* 453, October 19, 1958 [hereinafter cited as *Amtsblatt*]; 2 *Amtsblatt* 467-68, November 11, 1959.

3. Treaty Establishing the European Atomic Energy Community, March 25, 1957, art. 137 [hereinafter cited as *Euratom Treaty*]; Treaty Establishing the European Economic Community, March 25, 1957, art. 166 [hereinafter cited as *EEC Treaty*]; Treaty Establishing the European Coal and Steel Community, April 18, 1951, art. 32 [hereinafter cited as *ECSC Treaty*.]

4. *Euratom Treaty*, art. 138; *EEC Treaty*, art. 166; *ECSC Treaty*, art. 32a.

general represent in no way either the Communities or the public; they function only in the interests of justice. Although the institution of the advocate-general is unknown in the common law systems, it is used extensively in French administrative law procedure. In fact, the advocate-general in the judicial organization of the Communities is modeled after the Government Commissioner of the French Conseil d'Etat, the most important of the French administrative courts and the apex of the French administrative court system.<sup>5</sup>

Since the origins, powers, and objectives of the three European Communities are contained in international treaties signed by the six Member governments,<sup>6</sup> the Court, a creation of these treaties, has basically the character of an international tribunal. However, the competences assigned the Court by the three Treaties go far beyond the jurisdictional powers normally possessed by an international tribunal in the traditional sense. Indeed, the Court's role as an administrative and a constitutional tribunal has been much more significant than its role as an international tribunal. Moreover, the Treaties have conferred upon the Court in certain instances civil jurisdiction in a common law sense and in other cases have assigned to it the functions of a disciplinary court and of an arbitration tribunal. Access to the Court is not limited to the usual subjects of international law, the governments of states, but is also afforded to private persons—natural and legal—affected by the Treaties as well as to some of the institutions of the Communities.<sup>7</sup> The judgments of the Court can be enforced against private parties in the Member States in the same manner as those of the national courts. Enforcement of judgments against governments of the Member States is only possible under the ECSC Treaty which provides the imposition

5. See DELVAUX, *LA COUR DE JUSTICE DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 14 (1956). Mr. Delvaux is one of the justices of the Court. For additional information see SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* 23-41, 138-39 (1954); VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY* 44-48 (1955).

6. Germany, France, Italy, Belgium, The Netherlands, and Luxembourg.

7. Cf., Euratom Treaty, arts. 126(2), 141-49, 151-54; EEC Treaty, arts. 157(2), 169-76, 178-82; ECSC Treaty, arts. 12(2), 33-42, 89(2). See also BEBR, *JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES* 22 (1962); Stein, *The New Institutions, in AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET, A LEGAL PROFILE* 70-71 (Stein & Nicholson eds. 1960); WOHLFARTH, EVERLING, GLAESNER & SPRUNG, *DIE EUROPAISCHE WIRTSCHAFTSGEMEINSCHAFT, KOMMENTAR ZUM VERTRAG* 473, Preliminary Comments No. 3 before Article 164 (1960); van Houtte (Registrar of the Court), *La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier*, in 2 *EUROPEAN YEARBOOK* 183-222. Advocate-General Maurice Lagrange in *La Cour de Justice de la CECA, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE* 417, distinguishes only between two broad categories, namely, the competence of an administrative and of a constitutional court. VALENTINE, *op. cit. supra* note 5, at 65-69 and DAIG, *DIE GERICHTSBARKEIT DER EUROPAEISCHEN WIRTSCHAFTSGEMEINSCHAFT UND DER EUROPAEISCHEN ATOMGEMEINSCHAFT, ARCHIV DES OEFFENTLICHEN RECHTS* 132-208 (1958) analyze the competence of the Court in great detail, but do not establish any broad categories of jurisdiction.

of sanctions under certain conditions; the EEC and Euratom Treaties, however, have dispensed with the sanction procedure.<sup>8</sup>

From its inception until the end of the 1962-63 term in July of 1963, the Court has rendered 103 decisions and opinions and at the time of adjournment nearly eighty cases were pending. In an appraisal of the case law developed by the Court up to 1960, Mr. Maurice Lagrange, one of the two advocates-general, declared that one striking fact stood out clearly: "The Court's role has been undoubtedly more important than had been foreseen; and, above all, it has been considerably different from that which had been visualized originally."<sup>9</sup> This statement of Mr. Lagrange applies to an even greater extent today; the judgments rendered by the Court since the end of 1960 have further enhanced the position of importance which the Court occupies within the Community of the six Member States, especially as far as economic developments are concerned.

Many of the opinions which the Court has filed over the years have affected private enterprises in the Member countries and have often involved large sums of money, occasionally running into the millions of dollars.<sup>10</sup> Some of the decisions have resulted in profound economic changes with actual and potential social implications for certain population groups.<sup>11</sup> Others have dealt with the legality of governmental actions of the Member States; in several judgments the

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8. Euratom Treaty, arts. 159, 164; EEC Treaty, arts. 187, 192; ECSC Treaty, arts. 44, 88, 92.

9. Lagrange, *The Role of the Court of Justice of the European Communities as Seen Through Its Case Law*, LAW & CONTEMP. PROB. 400, 416 (1961).

10. An outstanding example of such a decision is Mannesmann AG v. High Authority, supported by Phoenix-Rheinrohr AG, (No. 19/61) July 13, 1962, 8 Sammlung der Rechtsprechung des Gerichtshofes [hereinafter cited as *Sammlung*] 717 [1962]. This decision was one of many arising out of the application of a system of subsidy payments for the equalization of the cost of scrap metal when this material was in short supply during the middle 1950's, and the world market price was high. Although the system was discontinued in 1958 when ample supplies of scrap metal became available, litigations as to the liability for these payments and their size continued, and even today forty-seven cases pertaining to the final settlement of outstanding payments are still pending before the Court (*List of Cases pending before the Court*, June 17, 1963). For additional information and other cases see BEBR, *op. cit. supra* note 7, at 62-64.

11. *E.g.*, Fédération Charbonnière de Belgique v. High Authority, (No. 8/55) July 16, 1956, November 29, 1956, [1955-56], 2 Sammlung 155, 197; Société des Charbonnages de Beeringen v. High Authority, (No. 9/55) December 12, 1956, 2 Sammlung 331 [1955-56]. These decisions sustained the first phase of the High Authority's long-range plan to make the Belgian coal industry more efficient. This plan included the closing of some of the Belgian mines in which efficiency could not be sufficiently improved with the result that some of the Belgian miners were thrown out of work and had to be retrained for other occupations. Several decisions of the Court also dealt with the running conflict between the High Authority and the German Ruhr coal industry. The former would like to break up the strong cartelization of the sales activities for Ruhr coal, whereas the latter claims that too much competition might have deleterious effects upon the German coal miners. See, *e.g.*, Ruhrkohlenverkaufsgesellschaften "Geitling", "Mausegatt" & "President" v. High Authority, (Nos. 16-18/59) February 12, 1960, 6/1 Sammlung 45 [1960]. See also DIEBOLD, *THE SCHUMAN PLAN* (1959) 200-16, 380-93.

Court has found such actions to contravene the Community law found in the Treaties, and, interestingly enough, the governments concerned have never refused to comply with rulings of the Court.<sup>12</sup> Finally, in three fairly recent instances the Court was requested by national tribunals in the Member States to issue rulings on the interpretation and application of the EEC Treaty which were then used as a basis for deciding cases pending before the national courts.<sup>13</sup> In view of the far-reaching significance which the Court has obviously assumed for governments and private individuals alike in the Member States, one may be justified in asking who are the justices wielding such extensive power and responsibility. How are they appointed and under what conditions can they be removed from office? What are their duties and privileges, and what measure of judicial independence do they possess? The exploration of these and other questions concerning the justices of the Court of the European Communities is the purpose of this article.

## II.

### APPOINTMENT

In contrast to the specialized qualifications an individual must possess in France and in other Member States for appointment to judgeship on the highest court, the three Treaties use merely a general formula which states: "The judges . . . shall be chosen from among persons of indisputable independence who fulfill the conditions required for the holding of the highest office in their respective country or who are jurists of recognized competence."<sup>14</sup> (Emphasis added.) This formula is in keeping with the Statute of the International Court

12. *E.g.*, EEC Commission v. The Government of the Republic of Italy, (No. 10/61) February 27, 1962, 8 Sammlung 1. Italy had applied to radio parts imported from Member States a higher tariff than was justified by the tariff in force on January 1, 1958, the date which was to be used for the calculation of the progressive tariff reductions mandatory for the realization of the Common Market. A very recent decision sustains the EEC Commission against a complaint by the Federal Republic of Germany that its quota granted by the Commission for the import of oranges from countries other than Common Market members was too small. (No. 34-62, July 15, 1963, mimeographed advance copy.) Thus, decisions of the Court may even have implications for the external relations of the Community.

13. *E.g.*, Request for a Preliminary Ruling by the Court of Appeals at The Hague (Netherlands) in the matter of Kledingverkoopbedrijf De Geus v. Robert Bosch GmbH, (No. 13/61) April 6, 1962, 8 Sammlung 97 [1962]. This was a very important judgment which pertained to the interpretation and application of the anti-trust provisions of the EEC Treaty. For an excellent analysis of this judgment see Jeantet, *Observation sous l'arret de la Cour du 6 Avril 1962*, JURIS-CLASSEUR PERIODIQUE No. 24, June 13, 1962. The effect of this decision upon the private corporations doing business is far-reaching. Another very significant judgment of the Court, highly favorable to European integration, can be found in Request for a Preliminary Ruling by the Tariff Commission in Amsterdam (Netherlands) in the matter of van Gend & Loos v. The Finance Administration of the Netherlands, (No. 26/62) February 5, 1962, 9 Sammlung 1 [1963].

14. Euratom Treaty, art. 139; EEC Treaty, art. 167; ECSC Treaty, art. 32b.

of Justice at The Hague which stipulates in Article 2 that the Court is to be composed of a "body of independent judges," elected from among persons "of high moral character, who possess the qualifications required in their country for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law."<sup>15</sup>

Prior to the establishment of the EEC and Euratom the pertinent provisions of the ECSC Treaty with regard to the qualifications for appointment to judgeship were even less stringent. The only requirements for appointment were "recognized independence and competence." As a consequence, it was possible for an individual without formal legal training to become a justice of the Court and two of the original judges appeared to have been "non-jurists."<sup>16</sup> Today these two men are no longer members of the Court and all appointees must at least have a law degree, although it is not necessary for them to have had prior experience on the bench or to possess the specific, technical qualifications required for appointment to judicial office in their country.<sup>17</sup>

The Treaties are silent about the nationality of the appointees for a judgeship. Since according to explicit provisions in the Treaties the members of the executive organs — the ECSC High Authority and the EEC and Euratom Commissions — must be nationals of the Member States,<sup>18</sup> some writers have concluded that such a requirement does not apply to the judges of the Court, and that therefore a national of any state may be appointed as a justice.<sup>19</sup> However, the validity of the argument *e contrario* is open to serious doubt since the judges, in a broad sense, are civil servants of the Communities and the personnel statutes specify that normally only nationals of the Member States can be given a permanent civil service appointment.<sup>20</sup> In practice all judges so far have been citizens of the Member States, and an informal agreement between the Member governments as to the principle of allocating judgeships to the six Member States, which will be discussed later, makes it very unlikely that in the foreseeable future a controversy will arise as to the appointment of a justice who is not the national of a Member State.

15. The qualifications for appointment to the now defunct Permanent Court of International Justice and the Central American Court of Justice were similar. See HUDSON, *INTERNATIONAL TRIBUNALS, PAST AND FUTURE* 34, 38-41 (1944).

16. ECSC Treaty, art. 32. This article was amended when the EEC and Euratom Treaties came into force. The judges were Jaques Rueff and Joseph Serrarens.

17. Cf., BAECHLE, *DIE RECHTSSTELLUNG DER RICHTER AM GERICHTSHOF DER EUROPAEISCHEN GEMEINSCHAFTEN* 31-32 (1961).

18. Euratom Treaty, art. 126(1); EEC Treaty, art. 157(1); ECSC Treaty, art. 9(3).

19. BAECHLE, *op. cit. supra* note 17, at 41-48. For other writers see fn. 76.

20. Article 28a. For the text of the personnel statutes see 5 *Amtsblatt*, 1385/62-1460/62, June 14, 1962.

The term of office of the judges is six years and re-appointment at the end of the term is permissible. A partial renewal of the Court takes place every three years which affects three or four judges alternately. The three judges whose term of office expired at the end of the first term were chosen by lot.<sup>21</sup>

The length of tenure for the judges of the Court of the European Communities compares unfavorably with that of the International Court of Justice and its predecessor, the Permanent Court of International Justice. The statutes of the latter two courts provide for a tenure of nine years.<sup>22</sup> Only in the case of the former Central American Court of Justice did the judges of an international tribunal have a slightly shorter term of office than six years.<sup>23</sup> The relatively short period of service provided by the Treaties for the members of the Court has been criticised as tending to weaken the independence of the judges, and it has been asserted that the tenure provisions might reflect a desire on the part of the Member governments to preserve a degree of influence over the members of the Court.<sup>24</sup> This problem will be examined in greater detail subsequently.

The judges are appointed by the governments of the Member States "acting in common agreement."<sup>25</sup> This means that each of the six governments has a right of veto against the nomination of a judge by another government of the Member States. There is no knowledge that this veto has been used so far, and the fear of retaliation against future nominations makes it very unlikely that any of the six governments will ever exercise this right of veto.<sup>26</sup>

The judges elect by secret ballot from among their members the president of the Court for a term of three years and this term is renewable. However, the first president of the Court of the Coal and Steel Community was not to be elected, but appointed by the Member governments, and the same procedure was prescribed and used for the selection of the first president of the Court of the European Communities.<sup>27</sup>

21. Euratom Treaty, art. 139 (1-2); EEC Treaty, art. 167 (1-2); ECSC Treaty, art. 32b (1-2).

22. Statute of the Permanent Court of International Justice, art. 13; Statute of the International Court of Justice, art. 13.

23. The term was five years. See HUDSON, *op. cit. supra* note 15, at 25.

24. Stein, *op. cit. supra* note 7, at 69.

25. Euratom Treaty, art. 139(1); EEC Treaty, art. 167(1); ECSC Treaty, art. 32b(1).

26. See also BAESCHLE, *op. cit. supra* note 17, at 61-62.

27. See Euratom Treaty, art. 139(5); EEC Treaty, art. 167(5); ECSC Treaty, art. 32b(5), in connection with Section 5(1) of the Convention containing the Transitional Provisions (ECSC Treaty) and Euratom Treaty, art. 212(1); EEC Treaty, art. 244(1); ECSC Treaty, arts. 10-11.

The president performs important functions. Besides directing the work of the Court and presiding over its sessions and deliberations, the president possesses other significant powers. He may suspend the forced execution of a judgment of the Court or of a decision of the Communities' executive organs imposing pecuniary obliga-

Thirteen judges have been members of the Court since its inception in 1952; two of them, Mr. Louis Delvaux of Belgium and Mr. Ch. Leon Hammes of Luxembourg have served the Court continuously until the present. Three of the justices of the original Court, Mr. Massimo Pilotti of Italy, the first president, Mr. Joseph Serrarens and Mr. Adrianus van Kleffens, both from the Netherlands, served until 1958. When the Court of the European Communities came into being, they were replaced by Mr. A. M. Donner, a Dutchman, who was appointed president of the Court, and by Mr. Rino Rossi and Mr. Nicola Catalano, both of Italy. The latter was succeeded in March of 1962 by Mr. Alberto Trabucchi, also of Italy, and two months later, Mr. Jacques Rueff, a member of the original Court,<sup>28</sup> was replaced by Mr. Robert Lecourt, his compatriot. Finally, Mr. Otto Riese, the German member of the original Court, was succeeded in April 1963 by his fellow countryman, Mr. Walter Strauss. Thus today the Court is composed of the following justices: Donner, Delvaux, Hammes, Rossi, Trabucchi, Lecourt, and Strauss.<sup>29</sup>

The appointments of the judges over the last ten years reveal an interesting pattern of informal allocation of judgeships to different countries and the special weight apparently attributed to the office of the president. When Mr. Pilotti was president of the Court, Italy had only one judge and the Netherlands had two. However, when Mr. Donner became the president, the ratio between the two countries was reversed. While France, Germany, and Belgium have been allotted only one judgeship, they are compensated by the allocation of one advocate-general each to France and Germany and by the assignment of the post of registrar of the Court to Belgium.<sup>30</sup> Only Luxembourg,

tions on private persons. He may grant a stay in the execution of an action against which an appeal has been lodged with the Court, and he may issue interim orders. However, such rulings of the president are provisional and in no way prejudice the decisions of the Court on the substance of the matter before it. (*Compare* Protocol on the Statute of the Court of Justice of the European Community, art. 36 [hereinafter cited as Statute of the Court] with EEC Treaty, arts. 185-87, 192. Similar provisions are found in the other Treaties. See also RULES OF PROCEDURE OF THE COURT OF JUSTICE, art. 6 [hereinafter cited as RULES OF PROCEDURE].) Outside the realm of the Court, the president performs a very influential function by presiding over the "Committee of the Presidents" of the Coal and Steel Community. This committee is composed of the presidents of the Court, the High Authority, the Assembly, and the Council. It plays a very prominent role in the fiscal and personnel administration of that Community. ECSC Treaty, art. 78(3).

28. Mr. Rueff as well as Mr. Hammes and Mr. Serrarens are the judges of the original Court who were chosen by lot to serve only three years in their first terms. Although Mr. Serrarens was reappointed in 1955 for a term of six years, he served only three years of this term since he was not taken over into the Court of the European Communities in 1958.

29. Delvaux, Hammes, and Catalano were the first "three-year" judges of the Court of the European Communities. Delvaux, Hammes, and Trabucchi, the replacement for Catalano, are now slated to serve until September 1967. The terms of the other judges of the Court expire in October 1964.

30. The advocates-general are Mr. Maurice Lagrange of France and Mr. Karl Roemer of Germany. The registrar is Mr. Albert van Houtte. All have served from 1952 until now.



as the smallest country of the six, has been allotted merely one judgeship.

An informal agreement among the six governments as to the distribution of the posts of presidents between the executive organs and the Court also has a bearing on the pattern of positions within the Court. At the present time, the presidency of the EEC Commission is held by a German, the presidency of the Euratom Commission by a Frenchman, the chief executive of the High Authority is an Italian, and the president of the Court a national of the Netherlands. When after the expiration of Mr. Donner's first term as president the suggestion was made to nominate Mr. Riese, the German judge, as a candidate for this post, some of the governments of the Member States objected, even though according to the Treaties the president should be "elected" by the judges of the Court, and Mr. Riese might have had the necessary votes for his election. However, the election of Mr. Riese as the Court's president would have obviously disturbed the agreed patterns within the Court and among the major organs of the Communities and thus, for political reasons, the choice of nominees for the presidency of the Court was extremely restricted.<sup>31</sup>

From the foregoing it becomes quite obvious that the governments of the Member States have, in practice, the exclusive power of appointing their nationals to the positions on the Court allotted to them. This system resembles to some extent that of the defunct Central American Court of Justice under which the legislatures of each of the five participating states appointed one judge to the Court.<sup>32</sup> It contrasts with the method of selecting the judges for the International Court of Justice; they are elected by the United Nations General Assembly and the Security Council from a list of candidates nominated by "national groups" and not by the governments.<sup>33</sup>

Since the Treaties specify that the "governments" appoint the judges, the basic decision for the selection of a prospective justice is made by the cabinet in power in the Member State which has to fill an actual or future vacancy on the Court. In contrast to the practice in the Member States no participation by the parliament or any other governmental or political unit or the highest courts is required. The procedures to be utilized for the selection of an individual to serve as a judge of the Court are entirely within the discretion of the government. The assumption is justified that in essence the selection of a

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31. Cf., *Nieuw Rotterdamse Courant*, October 12, 1961.

32. HUDSON, *op. cit. supra* note 15, at 24.

33. Statute of the International Court of Justice, art. 4. For details regarding the complicated process of nomination see ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 122-25 (1961). The appointment process at the Permanent Court of International Justice was similar.

judge is a political decision although considerations regarding the professional qualifications of the candidate for judgeship necessarily play a very large or possibly predominant role. The fact that the appointing government is guided by political motives and will attempt to select a candidate from its own ranks, is in itself of course neither unusual nor contemptible provided that the candidate is fully qualified.<sup>34</sup> Nevertheless, the danger exists that the criterion of party affiliation might be more important for an appointment than professional qualification, or that a less than fully qualified individual will be appointed who, for domestic political reasons, is to be removed from his position within the governmental structure of his country, but who, for public relations reasons, must be given a new billet which has the appearance of a promotion.<sup>35</sup>

The detailed procedures employed by the governments of the Member States for the selection of the judges for the Court vary from country to country. Since the last two judges appointed were Mr. Lecourt and Mr. Strauss it might be of interest to describe briefly the selection procedures used by the French and German governments.

In France the Foreign Minister has currently the primary responsibility for the selection of a justice of the Court, but he must consult the Minister of Justice before making the selection. The final decision rests with the Cabinet. The political parties are neither consulted nor informed, nor is there any consultation regarding the proposed candidate with any professional group such as the bar association or association of judges. Considered for selection are professors of public or economic law and justices of the highest courts in France such as the *Conseil d'Etat*, *Cour de Cassation*, or the Court of Appeals in Paris, but other eminent personalities with legal background are also eligible. Mr. Lecourt was such a personality; he held the position of Minister of Justice in France several times during the period from 1948 to 1958.<sup>36</sup>

According to current appointment procedures in the Federal Republic of Germany suggestions of candidates for the judgeship at the Court are normally made by the Ministries of Justice, Economics, and

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34. Mr. Catalano's resignation and Mr. Trabucchi's appointment in 1962 is said to have been strongly motivated by political considerations. Mr. Trabucchi's brother was then Minister of Justice in Rome and Mr. Catalano's re-appointment in the fall of 1961 is supposed to have been made with the understanding that he would resign within a few months in order to make Mr. Trabucchi's appointment possible (*Nieuw Rotterdamse Courant*, October 12, 1961; *France Industrielle*, December 26, 1961).

35. Cf., BÄCKHLE, *op. cit. supra* note 17, at 61-62; Zweigert, *Empfiehl es sich, Bestimmungen ueber den Rechtsschutz zu aendern?*, paper presented in Cologne at the Conference 10 Jahre Rechtsprechung des Gerischthofs der Europaeischen Gemeinschaften, April 24-26, 1963 (paper as yet unpublished.)

36. Information obtained from the Legal Service of the French Ministry of Foreign Affairs during the writer's visit to Paris in July of 1963.

Scientific Research. A provisional decision is then made by the Cabinet which is transmitted to the Court for informal approval and after that to the governments of the other Member States for their consent. At this time, the parliamentary groupings of *all* parties are also informed, but it is not clear what would be done in case of any objections from any of the parties. Finally, the official Federal Guild of Lawyers (*Rechtsanwaltskammer*) and the Association of Judges and State Prosecutors is advised. In the case of the appointment of Mr. Strauss, informal sounding out of potential candidates was under way at the Ministry of Justice and possibly the Ministry of Economics since the former Federal Finance Minister Starke seemed to be interested in the judgeship. As soon as the decision was made by the Cabinet to appoint Mr. Strauss, all other efforts ceased and no other formal nominations were made. Apparently the political parties agreed, and no adverse criticism was voiced in the news media although Strauss had been implicated in the *Spiegel* affair of October, 1962 because he failed to inform his superior, Minister Stammberger, of the proceedings planned against the editors of that magazine.<sup>37</sup>

### III.

#### TERMINATION OF OFFICE

The office of a judge of the Court is terminated at the expiration of his term unless re-appointed; in addition, it may be terminated by the death of a judge or by his resignation. In the latter two cases, the successor holds office only during the unexpired period of his predecessor's term, as otherwise the rhythm of the partial renewal of the Court would be disturbed.<sup>38</sup> In the event of resignation, the retiring judge must continue to perform his duties until his successor assumes office.<sup>39</sup> During the first decade of the Court's existence, several judges have resigned from the bench; they are Mr. Catalano of Italy, Mr. Rueff of France, and Mr. Riese of Germany. Mr. Pilotti, the first president of the Court, and Mr. van Kleffens were not re-appointed at the expiration of their terms. Mr. Serrarens, who was one of the original three-year appointees of the Court of the Coal and Steel Community, received a second full term but could not serve out his six years since he was

37. Information obtained by the writer from the Ministry of Justice in Bonn during a visit in June of 1963. See also *Frankfurter Allgemeine Zeitung*, December 20, 1962; *Deutsche Zeitung*, October 13, 1962, February 2, 1963.

38. See discussion of this point *supra*.

39. *Cf.*, Statute of the Court, arts. 5, 7 (EEC Treaty); Protocol on the Statute of the Court of Justice of the European Atomic Energy Community, arts. 5, 7 [hereinafter cited as Statute of the Court]; Protocol on the Code of the Court of Justice, arts. 6, 8 [hereinafter cited as Statute of the Court.] (These statutes are contained in a special convention attached to the Treaties.) With regard to the "right" of resignation see БАЕЧНЛЕ, *op. cit. supra* note 17, at 68.

not appointed again when the Court of the European Communities came into being in 1958. All three men were willing to continue serving on the Court, although Mr. Pilotti was in his late seventies.

Dismissal of a judge from office can be effected only if he "no longer fulfills the conditions required for . . . [his] office or cannot meet anymore the obligations resulting from . . . [his] office."<sup>40</sup> It is interesting to note that the Statutes of the Court attached to the EEC and Euratom Treaties are more specific than the Statute of the ECSC Treaty which only speaks of non-fulfillment of the required conditions. Another more serious divergence in the texts of the Statutes of the Court is found in the provisions pertaining to the body which makes the decision regarding the incapacity of the judge. According to the Statutes attached to the EEC and Euratom Treaties this decision, which must be made by unanimous vote, has to be made by the judges and advocates-general. Under the Statute attached to the ECSC Treaty only the judges participate in this decision.<sup>41</sup> This dilemma could be solved easily by applying the principle of "*lex posterior derogat legi priori*," were it not for article 232 of the EEC Treaty. This article states that the provisions of that Treaty shall not affect those of the ECSC Treaty, "in particular in regard to the rights and obligations of Member States, the powers of the institutions of the said Community and the rules laid down by the said Treaty for the functioning of the common market for coal and steel." Since article 232 of the EEC Treaty is obviously concerned primarily with the continuation of the power relationships between the institutions of the Coal and Steel Community and the Member States, as well as with the continued operation of the coal and steel market, the application of the principle of *lex posterior* cannot be viewed as entirely excluded, especially in cases where the non-application of this principle would result in an impossible situation. It is inconceivable that the Court should operate under two conflicting rules with respect to the dismissal of a judge and therefore, under the principle of *lex posterior*, the provisions of the Statutes attached to the EEC and Euratom Treaties must be considered as applying exclusively as far as they are in conflict with previous regulations of the Statute of the ECSC Treaty.<sup>42</sup>

40. Statute of the Court, art. 6 (Euratom Treaty); Statute of the Court, art. 6 (EEC Treaty); Statute of the Court, art. 7 (ECSC Treaty); pertaining to the same matter is slightly different.

41. *Ibid.*

42. See also BAECHLE, *op. cit. supra* note 17, at 73-74. Cf., DAIG, *op. cit. supra* note 7, at 158, and the conclusions of Advocate-General Lagrange in *Fédération Charbonnière de Belgique* (No. 8/55) July 16, 1956, 2 *Sammlung* 197, 267, in which Mr. Lagrange emphasizes that the endeavors for reaching compromises in the drafting of international treaties often result in contradictory and unclear texts of the treaties.

Although the judge concerned does not participate in the deliberations regarding his dismissal, he must be invited by the president of the Court to appear before the other judges and advocates-general in closed session and to offer any statements or explanations. In the event that the Court decides to remove the judge from office, the registrar of the Court notifies the presidents of the other major organs of the Communities such as the Parliament, the executive organs, and the Council of Ministers. This notification constitutes the vacation of office;<sup>43</sup> the dismissed judge does not continue to hold office until his successor assumes his duties.<sup>44</sup>

#### IV.

##### DUTIES AND PRIVILEGES

As is the usual custom for international as well as national courts, each judge, before undertaking his duties, must swear an oath "to perform his duties impartially and conscientiously and to preserve the secrecy of the Court's deliberations."<sup>45</sup> The oath may be sworn in the form prescribed by the national law of the individual judge. It is taken during the first public session of the Court and, according to the practice developed over the years, has become the center of a festive ceremony in which members of the Luxembourg government, high officials of the three Communities, and representatives of the bar associations in the Member States participate.

Immediately after a judge has been sworn in, he must make a solemn declaration that, both during and after his term of office, he will "respect the obligations resulting therefrom, in particular the duty of exercising honesty and discretion as regards the acceptance, after . . . [his] term of office, of certain functions and advantages."<sup>46</sup> In addition to the obligations contained in his oath, namely impartiality, conscientiousness, and the preservation of secrecy with regard to the deliberations of the Court, the judge has other duties as well. In order to ensure that the judge will devote all his efforts to the Court, he must reside at the seat of the Court which is Luxembourg.<sup>47</sup> For the

43. Statute of the Court, art. 6 (Euratom Treaty); Statute of the Court, art. 6 (EEC Treaty); RULES OF PROCEDURE, art. 5, *Amtsblatt*, January 18, 1960.

44. Statute of the Court, art. 5(3) (Euratom Treaty); Statute of the Court, art. 5(3) (EEC Treaty).

45. Statute of the Court, art. 2 (Euratom Treaty); Statute of the Court, art. 2 (EEC Treaty); RULES OF PROCEDURE, 3 (1-2). The oath does not constitute an essential part of the judge's appointment; rather, it is an obligation arising from this appointment. For details regarding this issue see BAECHLE, *op. cit. supra* note 17, at 81.

46. Statute of the Court, art. 4 (Euratom Treaty); Statute of the Court, art. 4 (EEC Treaty); RULES OF PROCEDURE, 3(3). This declaration was not required under the Statute of the Court of the ECSC Treaty.

47. Statute of the Court, art. 13 (Euratom Treaty); Statute of the Court, art. 13 (EEC Treaty); Statute of the Court, art. 9 (ECSC Treaty). In view of the

same reason as well as for the sake of impartiality, he may not hold any political and administrative office, nor is he permitted to engage in any paid or unpaid professional activities except by special exemption granted by the Council of Ministers. Finally, for the purpose of safeguarding his impartiality and conscientiousness, a judge may not participate in the settlement of any case in which he has previously participated as a representative, counsel, or advocate of one of the parties, or on which he has been previously called upon to decide as a member of a tribunal, or a commission of inquiry, or in any other capacity. In cases of difficulties in the application of these provisions the Court is requested to make a decision.<sup>48</sup>

The obligations of the judges under the Statute of the Court of the ECSC Treaty are somewhat broader and in some respects more specific. They are not only prohibited from engaging in professional activities, but also in business activities and, in particular, "they may not acquire or hold, directly or indirectly, any interest in any business related to coal or steel during their term of office and during a period of three years thereafter."<sup>49</sup> Since these provisions are not in conflict with the Statutes of the Court of the EEC and Euratom Treaties, one must conclude that they are still in effect. The framers of these Statutes seem to have purposely omitted the detailed restraints as specified in the ECSC Statute because of the much larger scope of the EEC and Euratom Treaties and instead used a more general formula to fix the duties of the judges of the Court. However, there seems to have been no intention to abrogate the specific provisions of the ECSC Statute of the Court.<sup>50</sup> As a consequence, a newly appointed judge is obligated to dispose of any shares of steel or coal enterprises that he or possibly his family may own when entering office.

The Treaties endow the judges with certain specific immunities and privileges. First, in order to strengthen their independence and impartiality, the justices of the Court are granted immunity from legal process; this immunity continues after the expiration of their term with regard to any acts performed by them in their official capacity including anything that they may have spoken or written. This immunity, however, may be lifted by the Court sitting in plenary session. In that

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difficult housing situation in Luxembourg, this requirement may result in temporary separation of the judge from his family.

48. Statute of the Court, arts. 4, 16 (Euratom Treaty); Statute of the Court, arts. 4, 16 (EEC Treaty); Statute of the Court, art. 19 (ECSC Treaty). The statute of the International Court of Justice contains similar provisions.

49. Statute of the Court, art. 4 (Euratom Treaty); Statute of the Court, art. 4 (EEC Treaty).

50. Cf., BAECHLE, *op. cit. supra* note 17, at 102-04, who quotes BUNDESTAG, Doc. No. 3440/57, regarding the intention of the framers of the EEC and Euratom Treaties.

event, penal action may be brought against a judge, but such a case is justiciable within any of the Member States only before the tribunal competent to try judges of the "highest national judiciary."<sup>51</sup> The suspension of the immunity from legal process appears to be limited to penal action, and is not permitted if civil actions such as breach of contract or defamation are involved.<sup>52</sup>

Second, the judges of the Court, as all civil servants of the Communities, enjoy in each of the Member States exemption from any national tax on their salaries.<sup>53</sup> They may also import free of duty their household effects when taking up their position in Luxembourg, and may remove them free of tax to their own country at the end of their term of office. Furthermore, neither they nor their families are to be subjected to any immigration restrictions or formalities.<sup>54</sup>

Third, the judges, as civil servants in a broad sense, seem to benefit from a provision in the personnel statutes of the Communities which requires each institution to furnish assistance to their civil servants in case of threats, insults, libel, and other attacks that may be aimed at them or their families because of their official positions or their official activities. The Communities are obliged to compensate the affected civil servant for damages suffered unless he can obtain indemnification from the malefactor.<sup>55</sup> This provision may contribute, in a certain measure, to the preservation of the judges' independence and impartiality.

## V.

### JUDICIAL INDEPENDENCE

Although the maximization of judicial independence is a recognized goal for both national and international courts, the attainment of this goal is generally more complicated in the case of a multi-national judiciary. Without a lengthy term of office, preferably life tenure, decent remuneration, and stringent safeguards against arbitrary removal, judicial independence is likely to be an empty phrase. In addition, the judges must be individuals who have no other occupation,

51. Statute of the Court, art. 3 (Euratom Treaty); Statute of the Court, art. 3 (EEC Treaty). The ECSC Statute is similar.

52. VALENTINE, *op. cit. supra* note 5, at 44.

53. Protocol on the Privileges and Immunities of the Community, 11c [hereinafter cited as Privileges and Immunities] (ECSC Treaty); Protocol on the Privileges and Immunities of the European Economic Community, art. 12 [hereinafter cited as Privileges and Immunities] (EEC Treaty); Protocol on the Privileges and Immunities of the European Atomic Energy Community, art. 12 [hereinafter cited as Privileges and Immunities] (Euratom Treaty). The Communities themselves, however, now levy a small tax on the salaries paid by them to their civil servants.

54. Privileges and Immunities, art. 11c-d (Euratom Treaty); Privileges and Immunities, art. 11c-d (EEC Treaty); Privileges and Immunities, art. 11c-d (ECSC Treaty).

55. Personnel Statutes, art. 24.

and thus will be able to devote their full time to the discharge of their judicial responsibility. Finally, the methods of selection have a significant bearing on the judges' independence. Possibly, the problem of selection has caused more difficulty than any other in the staffing of international tribunals.

How strongly is judicial independence institutionalized in the Court of Justice of the European Communities? According to the Treaties the judges shall be chosen from among persons of "indisputable independence," and they must swear that they will perform their duties "impartially and conscientiously."<sup>56</sup> These requirements, however, are primarily programmatic exhortations and guidelines; they cannot assure a judge's independence.

On the other hand, some of the provisions of the Treaties fulfill certain of the criteria put forth above, and thus contribute materially to the strengthening of judicial independence. The judges cannot be removed from office except by their peers and then only when they "no longer fulfill the required conditions or meet the obligations of their office."<sup>57</sup> Although this is a flexible clause, one can trust the other judges to apply it with the utmost care and diligence since it is an extraordinary remedy. The judges are not permitted to engage in activities that may distract them from their main task at the Court. They are barred from participating in any case with which they have previously been concerned as agent or counsel for one of the parties or as a member of a tribunal or commission of inquiry. And a novel, but highly commendable principle introduced by the framers of the Treaties makes it impossible for a party to a litigation to invoke either the nationality of a judge, or the absence from the bench of a judge of the party's own nationality as grounds to request a change in the composition of the Court or one of its chambers.<sup>58</sup>

The salaries of the judges of the Court exceed those normally paid in Continental Europe for such positions, and their size can be assumed to bolster judicial independence. The base pay of the judges is dollars 12,000, that of the president of the Court dollars 15,000. The judges also receive a quarters allowance amounting to fifteen per cent of their salaries and a special expense allowance which is ten per cent of the base pay for the judges and twenty per cent for the president of the Court. Moreover, provisions are made for free accident insurance as

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56. Euratom Treaty, art. 139; EEC Treaty, art. 167; ECSC Treaty, art. 32b. Statute of the Court, art. 2 (Euratom Treaty); Statute of the Court, art. 2 (EEC Treaty); Statute of the Court, art. 2 (ECSC Treaty).

57. Statute of the Court, art. 6 (EEC Treaty).

58. Statute of the Court, art. 16(4) (Euratom Treaty); Statute of the Court, art. 16(4) (EEC Treaty); Statute of the Court, art. 19 (ECSC Treaty).



well as retirement and other social security benefits. When a judge is not reappointed he is entitled to a separation allowance which consists of fifty per cent of his last salary to be paid for a period of three years.<sup>59</sup> The salaries and other benefits are *not* paid to the judges by their national governments (as was the case, for instance, with the judges of the defunct Central American Court of Justice) but by the three Communities which share these expenditures—another factor that tends to strengthen the independence of the justices.<sup>60</sup>

Despite these favorable provisions of the Treaties, the independence of the judges of the Court was questioned even before the Court came into being in 1952<sup>61</sup>, and a certain amount of criticism in this respect has continued until today.<sup>62</sup> This criticism centers primarily on the relatively short period of the judges' tenure and the methods of appointment and re-appointment, which, as has been pointed out earlier, lie entirely within the discretion of the governments of the Member States. Since for re-appointment the justices are exclusively dependent upon their own governments, which are often parties to disputes before the Court, they may be tempted, on occasion, to let thoughts of the future color their thoughts of the present. If a judge should be denied re-appointment by his government, he might be without employment for some time or may have to accept a much less desirable position than the one from which he resigned in order to enter the service of the Communities. Mr. Etienne Hirsch's failure to be re-appointed by the French government to the presidency of the Euratom Commission after his first term expired in January of 1962,<sup>63</sup> and the fact that some of the judges of the Coal and Steel Community Court were replaced when it became the Court of the three Communities, undoubtedly are remembered by the justices of the Court.<sup>64</sup> Fortunately, for the protection of the judges' independence, the Treaties and the Statutes of the Court make no provision for dissenting opinions to the decisions of the Court. While sound arguments can be made for the publication of dissenting opinions as having a salutary influence upon the jurisdiction of the Court,<sup>65</sup> it may also lead to an emergence of national interests within

59. BAECHLE, *op. cit. supra* note 17, at 130-31.

60. Convention Relating to Certain Institutions Common to the European Communities, art. 6; *cf.* HUDSON, *op. cit. supra* note 15, at 24-25.

61. *Cf.*, MASON, THE EUROPEAN COAL AND STEEL COMMUNITY, EXPERIMENT IN SUPRANATIONALISM 25 (1955), who cites the debates in French Economic Council in 1951.

62. *E.g.*, DELVAUX, *op. cit. supra* note 5, at 15; HAMMES, CONGRESSO INTERNAZIONALE DEI MAGISTRATI, Roma, October 13, 1958, 145; ZWEIGERT, *op. cit. supra* note 35.

63. See EURATOM COMMISSION, DISCOURS DE M. ETIENNE HIRSCH, PRÉSIDENT DE LA COMMISSION DEVANT L'ASSEMBLÉE EUROPÉENNE A STRASBOURG (December, 1961).

64. Riese, *Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft fuer Kohle und Stahl*, DEUTSCHE RICHTERZEITUNG (1958), 270, 271.

65. *Cf.*, ZWEIGERT, *op. cit. supra* note 35; Riese, *op. cit. supra* note 64, at 272.

the Court, which would not only be detrimental to the independence and impartiality of the judges, but possibly also to the authority of the Court.<sup>66</sup>

Judge Riese declared, in 1958, that fears the short term of office and the appointment procedure for the judges would endanger their independence, have proved to be unfounded. He stated that "in no case have the judges been guided by extraneous, political or nationalistic viewpoints."<sup>67</sup> In all likelihood, the statement applies just as much to the present judges as it did when Mr. Riese wrote these words. Yet from an institutional point of view, the danger to the independence of the Court's judges continues to exist until the provisions of the Treaties with regard to the length of their terms of office and the methods of their appointments have been changed in such a manner as to fully insure their independence.

A number of valid proposals to attain this objective have been made. With regard to the term of office, it has been suggested that the judges should be appointed either for life or at least for twelve years with payment of their full salaries for life. With regard to the method of appointment, it has been proposed to establish a selection committee within the European Parliament or to have this Parliament elect the judges from a list submitted by the governments of the Member States. Another proposal advocates the selection of new judges for position vacancies by the Court itself, possibly from a list prepared by the highest courts in the Member States. In this manner the highest quality of the judges would be assured since normally members of the highest courts are in the best position to evaluate the qualifications of candidates for judgeships. The least desirable proposal appears to be the adoption of the system used by the International Court of Justice at The Hague since it is extremely complicated and cumbersome.<sup>68</sup> To put into effect any of the above proposals requires a revision of the Treaties. However, the political relations existing at present between the Member States make any revision of the Treaties in the near future a very unlikely undertaking since it is doubtful that agreement by all Member governments on the solution of controversial problems could be reached.

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66. Accord, Donner, *The Court of Justice of the European Communities*, THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 232, 234 (May, 1962); BAECHLE, *op. cit. supra* note 17, at 85.

67. Riese, *op. cit. supra* note 64, at 271. See also Daig, *Die vier ersten Urteile des Gerichtshofs der Europaeischen Gemeinschaft fuer Kohle und Stahl*, 361, 373, JURISTENZEITUNG (1955). But see HAMMES, *op. cit. supra* note 63, at 145.

68. For fuller information see BAECHLE, *op. cit. supra* note 17, at 57-62, 126-30, who cites other proposals; also ZWIGERT, *op. cit. supra* note 35, at 9-10; EUROPAEISCHES PARLAMENT, *Bericht des Politischen Ausschusses ueber die Zuständigkeiten und Befugnisse des Europaeischen Parlaments*, Doc. No. 143, 25, June 14, 1963.

## VI.

## THE BACKGROUND OF THE JUDGES

The extensive powers which the justices of the Court of the European Communities hold in their hands makes it essential to inquire as to what sort of men have become justices of that Court and of its predecessor, the Court of the Coal and Steel Community. After all, there is little question that in the interpretation and application of the Treaties and the legal rules derived from them, the backgrounds and economic and political philosophies of the judges are likely to be reflected in the Court's decisions whenever the possibility of choice from among a number of legally acceptable principles presents itself.

In keeping with the provisions of the ECSC Treaty, that judges of the Court did not need to be jurists,<sup>69</sup> two of the original members of the Court lacked a formal legal education. These gentlemen were Mr. Serrarens and Mr. Rueff. All the other judges had completed their formal law studies, two of them, Mr. Donner and Mr. Trabucchi, receiving their doctor of law degrees *cum laude*.

Of the academically trained jurists who have served on the Court, three judges, or less than thirty per cent of the justices, seem to have had substantial previous experience on the bench. They are Justices Hammes, Riese, and Rossi. Mr. Pilotti, Mr. van Kleffens, and Mr. Strauss also have had judicial experience, but their careers as judges appear to have been rather limited. Four of the judges have practiced law or acted as legal counsel to private enterprises or public organizations. They are Catalano, Delvaux, Lecourt and van Kleffens, but none of them seem to have been a practitioner recently. Five of the justices have been professors of law; while for Justices Hammes and Catalano the academic careers appeared to have played only a minor role. Justices Donner, Riese, and Trabucchi have distinguished themselves as academicians and have occupied positions of leadership in legal societies and conferences. Finally, four of the judges, Hammes, Catalano, Rossi, and Pilotti, performed for short periods of time the functions of prosecutor in their respective countries.

It is interesting to note that several judges occupied important executive and administrative positions. Delvaux was for a short time Belgian Minister of Agriculture in 1946. Lecourt held several times during the period from 1948 to 1958 the post of Minister of Justice and was from 1959 to 1961 French Minister of State for Aid and Cooperation between France and the Member States of the French Community, and later for the Overseas Departments and Territories.

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69. ECSC Treaty, art. 32, prior to its amendment in 1958.

Strauss was Secretary of State in the Federal Ministry of Justice for more than twenty years before being appointed to the Court of Justice. Riese was also a high official in the German Ministry of Justice, but his service was performed during the late 1920's. Van Kleffens held high positions in the Dutch Ministry of Economics, and Catalano occupied several governmental posts in Italy. Justice Pilotti was an Italian delegate to a number of international conferences, and was Assistant Secretary-General of the League of Nations from 1932 until 1937. Mr. Rueff, a "non-jurist," had a strong administrative background; he held several very important posts in the French Ministry of Finance and in 1926 was Minister of Finance in the Cabinet of Mr. Poincaré. He was *sous-gouverneur* of the Bank of France in 1939 and was a member of the French delegation to the United Nations. In addition, he has been a professor at the *Ecole Libre des Sciences Politiques*.

Several of the judges of the Court have been quite active in politics. Mr. Delvaux has been a deputy of the Belgian Chamber of Representatives from 1936 to 1946. Judge Lecourt has been a member of the French Assembly from 1945 to 1958 and has been president of the parliamentary group of the Popular Republican Party (MRP) several times. He was also a member of the executive committee of the European Movement. Finally, Mr. Serrarens, another "non-jurist," was a member of the Dutch Senate in 1929 and was a deputy in the Assembly of the Netherlands from 1937 to 1952. In addition, he has participated in many international labor conferences and has long been active in the international labor movement. He was Secretary-General of the International Confederation of Christian Unions from 1920 until 1952. Mr. Strauss participated in the organization of the local Christian Democratic Party in Berlin, but later efforts to become elected to the German Parliament were unsuccessful. He has also been president of the politically influential Protestant Working Group of the Christian Democratic Party.<sup>70</sup>

This variety of backgrounds of the justices of the Court revealed by this brief survey is surprising; especially when one considers that in France, Germany, and many other countries on the Continent of Europe most judges are professionally trained and rise through a career service to the highest judicial positions in their countries. In the United States, a great deal of attention has been focused in recent years upon the question of whether individuals should have experience on the bench before they are considered eligible for appointment to the Supreme

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70. The material on the background of the judges is taken from *ANNUAIRE-MANUEL DU PARLEMENT EUROPÉEN 1961-1962*, 109-12 (1962); *NOTICE BIOGRAPHIQUE SUR LES MEMBRES DE LA COUR* (1954); *DER SPIEGEL*, January 24, 1962, pp. 24-34; *Weser-Kurier* (Bremen) November 7, 1962.

Court. Professor John R. Schmidhauser, in his study of the politics and personalities of the members of the United States Supreme Court comes to the conclusion that "there is little in the history of the Supreme Court to suggest that justices with prior judicial experience were more objective or better qualified than those who lacked such experience."<sup>71</sup> Schmidhauser points out that some of the Court's most distinguished members, among them Marshall, Taney, Hughes, Brandeis, and Stone, were totally lacking in this experience before their appointments to the Supreme Court.

In view of the comprehensive jurisdiction of the Court which imposes on it the obligation to solve legal problems in the economic, social, administrative, and even political sphere, the varied backgrounds and experiences of the judges of the Court may be an advantage.<sup>72</sup> Indeed, if the three Communities and their institutions may be viewed as the possible forerunners of a federal governmental system for the Member States, the broad knowledge possessed by some of the justices in the fields of economics, finance, and administration may be a significant factor in arriving at decisions which transcend narrow judicial considerations, and which reflect an application of the Treaties with a keen eye on the purpose of the Communities and with an appreciation for the future.<sup>73</sup> The assumption is justified that the diversity of interests, experiences, and values represented in the deliberating sessions of the Court may have stimulated a fertile interchange of concepts and ideas and thus broadened the views of the participants. On the other hand, the exclusive appointment of career judges might have led to conflicting narrow parochial attitudes among the justices with the result that some of the judgments might have represented merely compromises between national legal doctrines and traditions.<sup>74</sup> Of course,

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71. SCHMIDHAUSER, *THE SUPREME COURT* 54 (1961).

72. In the ratification proceedings of the ECSC Treaty in the German Parliament one of the deputies stated that "the Court of Justice must not be merely a collection of lawyers who are strangers to the real world, but of men who are familiar with actual conditions and who recognize the common interest of the European workers." BUNDESTAG, OFFICIAL REPORTS 7712 (1951-52).

73. In many decisions the Court has used the purposes of the Treaties as an important aid in the interpretation of their provisions. See, e.g., *Government of the French Republic v. High Authority*, (No. 1/54) December 21, 1954, 1 Sammlung 7, 23 [1954-55].

74. See Riese, *op. cit. supra* note 64, at 273. In the deliberations of the judges the language problem has at times been an impediment since the judges of the Court have not been chosen for their linguistic abilities, but for their knowledge of the law. Although all documents before the Court are translated into the four official languages recognized by the Treaties—French, German, Italian, and Dutch—and while a simultaneous translation is provided during oral procedures (*cf.*, RULES OF PROCEDURE, arts. 29-31), translators are not used during the secret deliberations of the Court concerning the decision in a case. The practice has been to use the French language during these deliberations which put at a serious disadvantage those judges whose mother tongue was not French and who had not mastered the intricacies and nuances of the French legal jargon. For more information regarding this problem see Riese, *op. cit. supra* note 64, at 272, and Baechle, *op. cit. supra* note 17, at 51-55.

experience on the bench cannot be disregarded as an important qualification for the justices of the Court. The ideal composition of the Court of the European Communities might be a mixture of both career judges and men with a thorough legal background that have had experiences and proven themselves competent in high positions in administration, business, and the labor movement.

It might be interesting to speculate as to how much the attitudes of the judges toward European integration influenced the decisions of the Court. Since the average age of the judges is almost sixty-one years,<sup>75</sup> most of them have had first-hand experience with the miseries of two world wars. One may assume, therefore, with some justification that the judges view a united Europe as a means of preventing the use of war as an instrument for the settlement of disputes between the European states. In addition, some of the judges participated prominently in international conferences, held positions with international organizations, and were active in movements for a united Europe. Although it might be possible to conclude from the experiences of the judges that a majority, at least, looks with favor upon the political unification of Europe—which of course would also increase the prestige of the Court and their positions as judges—there is no indication that such an attitude has resulted generally in a very strong pro-integrationist jurisprudence.<sup>76</sup> Rather, most of the judgments of the Court reflect a desire to render decisions which are practicable within the framework of the Treaties and which take into consideration the sometimes painful economic changes and dislocations that are being brought about by the goals and principles set forth in the Treaties. That the Court has refrained from a very strong pro-integrationist course is a sign of political wisdom, since such a course might well have aroused vigorous resentment within the governments of the Member States and among politically influential economic groups with the result that economic and especially political integration would actually have been impeded.

The future of the Court, nevertheless, is closely tied to the future of economic and political integration of the Member States. As integration progresses, the role of the Court will increase in importance; at the same time, the growing number of decisions of the Court—

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75. The youngest judge, Professor Donner, is the president of the Court. He is 45 years old.

76. An outstanding exception is the Preliminary Decision rendered upon the request of the Tariff Commission in Amsterdam in the matter of *van Gend & Loos*, (No. 26/62) February 5, 1963, 9 *Sammlung* 1 [1963]. The Court held in this decision that the prohibition of the EEC Treaty against the introduction of new charges and customs duties on the trade between the Member States established not only obligations of the governments of these States, but constituted municipal law within the Member States which created individual rights of private persons that had to be observed and safeguarded by the domestic courts of these States.

nearly eighty cases were pending in the summer of 1963—reflects confidence in the Court and is therefore a significant factor for the progress of integration. The increasing workload of the Court may make it necessary to expand the number of judges in the future. The Treaties have anticipated this possibility; upon the request of the Court, the Council of Ministers may by unanimous vote increase the number of judges.<sup>77</sup> Thus the way is paved for the gradual realization of Jean Monnet's prediction, made more than ten years ago, that the Court would eventually become the Supreme Court of a European Federation.

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77. Euratom Treaty, art. 137; EEC Treaty, art. 165; ECSC Treaty, art. 32.